Office-Supreme Court, U.S.
FILED
FEB 18 1967
JOHN F. DAVIS, CLERK

No. 1077

In the Supreme Court of the United States

OCTOBER TERM, 1966.

ERNEST MALLORY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Ernest Mallory, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURTS BELOW:

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on April 14, 1966, and is not reported, but appears in the record with and certified by the Clerk of the Court of Appeals for the Seventh Circuit and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment was entered on January 5, 1967, and has not been reported in the Federal Reporter as yet, but is set forth in the appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 5, 1967. The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I.

Whether a trial abuses its discretion in commenting on a defendants criminal record and comparing it with the absence or lack of criminal records on the part of the government's witnesses prior to finding the defendant guilty?

II.

Whether the conflicting and contradictory, testimonies of the government's two chief witnesses have the effect of negativing each other resulting in a failure of the government to prove the defendant guilty beyond a reasonable doubt?

STATUTES INVOLVED

The statutory provisions involved are Title 26, U.S.C., Section 4705(a), Internal Revenue Code of 1954; and Title 21, U.S.C., Section 174.

STATEMENT OF THE CASE

On December 30, 1965, a two-count indictment was returned against Ernest Mallory in the Northern District of Illinois. The first count charged him with unlawfully selling, bartering, exchanging and giving away approximately 17,411 grams of heroin, a narcotic drug, to Earl Jackson on February 26, 1965, not in pursuance of a written order from the said Carl Jackson on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, in violation of the United States code, Section 4705(a), Internal Revenue Code of 1954.

Count II charged the defendant with fraudulently and knowingly receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of approximately 17.411 grams of heroin, a narcotic drug, after it had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States, contrary to law; in violation of Title 21, U.S.C., Section 174.

On February 14, 1965, Defendant Mallory entered a plea of not guilty.

On April 13, 1966, the defendant waived trial by jury, and on April 14, 1966, defendant was found guilty, by Judge Richard B. Austin, under both counts of the indictment. On May 24, 1966, the defendant was sentenced to a term of seven (7) years on each count, said sentence to run concurrently with each other, and a fine of One Thousand Dollars ($1,000.00) was ordered.

REASONS FOR GRANTING THE WRIT

A FEDERAL JUDGE MAY NOT COMPARE DEFENDANT'S CRIMINAL RECORD WITH GOVERNMENT WITNESSES' LACK OF CRIMINAL RECORDS WHEN DOING SO PRIOR TO FINDING DEFENDANT GUILTY INFERS THE FINDING IS NOT JUSTIFIED SOLELY BY THE EVIDENCE.

The trial judge, prior to finding the defendant guilty, made the following statement: "I have a choice here of believing the two agents and Dorothy Mae Jones, who according to the record, have no felony records and that of your client, who has a triple felony record." This statement from the bench implies that the judge found the defendant, guilty, not from the evidence, but because he had prior convictions for burglary. If this is to be the accepted policy of the courts, a defendant cannot receive a fair trial if he has a prior record. In a narcotics case, such a defendant is at the mercy of any narcotics offender, who after having been arrested can avoid having a criminal record by working as a government informer. This is why Dorothy Mae Jones has no record. As long as she works as an informer and testifies in a manner that makes conviction of the defendant a certainty, she will never acquire a criminal record because the crimes for which she is arrested will never result in convictions against her.

Regarding the federal agents, it is evident that a prerequisite for their employment is the absence of a criminal record. Therefore, for a trial judge to comment on such a fact, and compare the agents lack of criminal record with the defendant's criminal record is indicative of the court's prejudice and constitutes a denial of a fair trial to the defendant.

The cases cited by the government in its brief are not in point with the petitioner's argument. In *U. S.* v. *Senior*, 274 F.2d 613, 616 (7th Cir., 1960) and *Daniel* v. *U. S.*, 268 F.2d 849 (5th Cir., 1959), the courts held, "to show that a witness has been convicted of a felony is a well established method of impeachment", and "the trier of fact has the duty of determining what weight, if any, to give to this prior record as impeachment.

In these cases the only inference was to defendant's records and not to the absence of or lack of records of government witnesses, who, because of their known and apparent occupations, could not possibly have criminal records. The only inference that can be drawn from such an unfair comparison is that the decision was not determined from evidence of the defendant's guilt beyond a reasonable doubt.

II.

The conflicting and contradictory testimonies of the Government's two Chief Witnesses have the effect of negativing each other and resulting in a failure of the government to prove the defendant guilty beyond a reasonable doubt.

The government produced two witnesses who claimed they participated in the crime (as buyers of heroin) and therefore (they) were eye-witnesses. One, Agent Jackson, would have you believe that he gave the defendant $500.00 for heroin although he and the defendant had never seen each other before and were not introduced on this occasion. This defies credibility. Dorothy Mae Jones, the other key witness, admitted that she is not only a narcotic peddler but also a narcotic addict. She would have the court believe her testimony although she admitted that she had been arrested by the same agent Jackson for selling nar-

cotics. The witness Jones further testified that she expected a favorable disposition of her own case if Mallory, the defendant here, should be convicted in the instant case.

The testimony of Agent Jackson and Dorothy Mae Jones revealed numerous discrepancies. The statements made by Dorothy Mae Jones, under oath, relative to her having been arrested by Agent Jackson for selling narcotics in 1955 and having known Agent Jackson for ten years were in direct contradiction to Agent Jackson's testimony in which he stated he had only known Dorothy Mae Jones for one and a half years.

In further contradiction of each other, Agent Jackson testified that he had used Dorothy Mae Jones as an informer prior to this time; however, Dorothy Mae Jones testified that prior to February 26, 1965, she had never worked as an informant for Agent Jackson.

Dorothy Mae Jones testified that except for going to the Office of the Federal Bureau of Narcotics on the evening of February 26, 1965, she had never been there before; however, Agent Jackson, in his official written reports (Government's Exhibits 3500-1 and 3500-2), stated that he had met with the informant (Dorothy Mae Jones) at the Federal Bureau of Narcotics office on the morning of February 26, 1965, and at which time and place, the informant told him she could make a purchase of heroin. Agent Jackson further testified the report was true and correct.

The effect of such discrepancies negatives the effect of each witnesses' testimony so that neither is credible.

To sustain the finding of guilty in the lower courts this court must believe that there was substantial and credible evidence before the courts. There must be an exclusion of

every other hypothesis except that of guilt; the presumption of innocence obtains; not only does the presumption of innocence obtain but it starts at the commencement of the trial but it remained operating in favor of the defendant throughout the trial; the presumption of innocence alone is enough, is sufficient for an acquittal; the guilt of the defendant must be shown beyond a reasonable doubt; such conviction cannot be based upon suspicion; the facts established must be consistent with guilt, and inconsistent with "every reasonable supposition of his innocence"; the jury must (the judge here) acquit if the facts are consistent with innocence as they are with guilt, the burden is always upon the prosecution to prove the defendant's criminal act, and intent to commit crime beyond a reasonable doubt. These truisms need no citation of authority but they have, in fact, been collected in the cases of, *U. S.* v. *Schneiderman,* (1952), U.S.D.C., S. D. Cal.) 106 F. Supp. 906; *U. S.* v. *Foster* (U.S.D.C., S. D., N.Y.), 9 F.R.D. 367, affirmed 183 F.2d 201, affirmed 95 L. ed. 439; *U. S.* v. *Frankfeld,* 103 F. Supp. 48, affirmed 198 F.2d 679.

CONCLUSION

We Importune This Honorable Court to Grant Its Writ of Certiorari.

Respectfully submitted,

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